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EXECUTORS.

AT the present day executors and administrators hold the assets of the estate in a fiduciary capacity. Their rights and liabilities in respect of the fund in their hands, are very like those of trustees. But this way of regarding them is somewhat modern. I wish to call attention to several changes in the law which have taken place at different times and without reference to each other, for the purpose of suggesting that they are witnesses of an older condition of things in which the executor received his testator's assets in his own right. As usually is the case with regard to a collection of doctrines of which one seeks to show that they point to a more general but forgotten principle, there can be found a plausible separate explanation for each or for most of them, which some, no doubt, will regard as the last word to be said upon the matter.

I have shown elsewhere that originally the only person liable to be sued for the debts of the deceased, if they were disputed and had not passed to judgment in the debtor's lifetime, was the heir.[1] In Glanville's time, if the effects of the ancestor were not sufficient for the payment of his debts the heir was bound to make up the deficiency out of his own property.[2] In the case of debts to the king, this liability continued as late as Edward III,[3] royalty like religion being a conservator of archaisms. The unlimited liability was not peculiar to England.[4] While it continued we may conjecture with some confidence that a judgment against the heir was not confined to the property which came to him from his ancestor, and that such property belonged to him outright. At a later date, M. Viollet tells us, the French customary law borrowed the benefit of inventory from the Roman law of Justinian. The same process

[1] Early English Equity, 1 Law Quart. Rev. 165. The common Law, 348. Bracton 407 *b*, 61, 98 *a*, 101 *a*, 113 *b*. The article referred to in the Law Quarterly Review shows the origin and early functions of the executor. It is not necessary to go into them here.

[2] "Si vero non sufficiunt res defuncti ad debita persolvenda, tunc quidem hæres ejus defectum ipsum de suo tenetur adimplere: ita dico si habuerit ætatem hæres ipse." Glanville, Lib. 7, c. 8. Regiam Majestatem, Book 2, c. 39, § 3.

[3] 2 Rot. Parl. 240, pl. 35. St. 3 Ed. I., c. 19.

[4] Ass. Jerus., Bourgeois, ch. cxciii. 2 Beugnot, 130. Paul Viollet, Hist. du Droit Franç. 2d ed. 829.

had taken place in England before Bracton wrote. But in the earliest sources it looks as if the limitation of liability was worked out by a limitation of the amount of the judgment, not by confining the judgment to a particular fund.[1]

As was shown in the article above referred to, the executor took the place of the heir as universal successor within the limits which still are familiar, shortly after Bracton wrote. His right to sue and the right of others to sue him in debt seemed to have been worked out at common law.[2] It hardly needs argument to prove that the new rights and burdens were arrived at by treating the executor as standing in the place of the heir. The analogy relied on is apparent on the face of the authorities, and in books of a later but still early date we find the express statement, *executores universales loco hæredis sunt*,[3] or as it is put in Doctor and Student, "the heir, which in the laws England is called an Executor."

Now when executors thus had displaced heirs partially in the courts, the question is what was their position with regard to the property in their hands. Presumably it was like that of heirs at about the beginning of the fourteenth century, but I have had to leave that somewhat conjectural. The first mode of getting at an answer is to find out, if we can, what was the form of judgment against them. For if the judgment ran against them personally, and was not limited to the goods of the deceased in their hands, it is a more than probable corollary that they held those assets in their own right. The best evidence known to me is a case of the year 1292, (21 Ed. I.) in the Rolls of Parliament.[4] Margery

[1] Viollet, op. cit. The Common Law, 347, 348. "Hæres autem defuncti tenebitur ad debita praedecessoris sui acquietanda eatenus quatenus ad ipsum pervenerit, sci. de hæreditate defuncti, et non ultra," &c. Bracton, 61 *a*.

"Notandum tamen est, quod nullus de antecessoris debito tenetur respondere ultra *valorem* huius, quod de eius hereditate dignoscitur possidere." Somma, Lib. 2, c. 22, § 5, in 7 Ludewig, Reliq. Manuscript. 308, 309. Grand Coustum. c. 88. Compare also St. Westm. II. (13 Ed. I.) c. 19, as to the liability of the ordinary: "Obligetur decetero Ordinarius ad respondendum de debitis, quatenus bona defuncti sufficiunt, eodem modo quo executores hujusmodi respondere tenerentur si testamentum fecisset." See the cases stated below. I know of no early precedents or forms of judgments against heirs. I wish that Mr. Maitland would give the world the benefit of his knowledge and command of the sources on the matter. Later the judgment against heirs was limited to assets descended. Townesend, Second Book of Judgments, 67, pl. 26.

[2] Y. B. 20 & 21 Ed. I. 374, 30 Ed. I. 238. 11 Ed. III. 142. Id. 186. (Rolls ed.)

[3] Lyndwood, Provinciale. Lib. 3, Tit. 13. c. 5. (*Statutum bonæ memoriæ*), note at word, *Intestatis*. Dr. & Stud. Dial. 1, c. 19.

[4] 1 Rot. Parl. 107, 108. It may be remarked, by the way, that an excellent example of trustee process will be found in this case.

Moygne recovered two judgments against Roger Bertelmeu as executor of William the goldsmith. In the first case he admitted the debt and set up matter in discharge. This was found against him except as to £60, as to which the finding was in his favor, and the judgment went against him personally for the residue. In the second case the claim was for 200 marks, of which the plaintiff's husband had endowed her *ad ostium ecclesiæ*. The defendant pleaded that the testator did not leave assets sufficient to satisfy his creditors. The plaintiff replied that her claim was preferred, which the defendant denied. The custom of boroughs was reported by four burgesses to be as the plaintiff alleged, and the plaintiff had a judgment against the defendant generally. The defendant complained of these judgments in Parliament, and assigned as error that there came to his hands only £27 at most, and that the two judgments amounted to £40 and more. The matter was compromised at this stage, but enough appears for my purposes. If the defendant was right in his contention, it would follow in our time that the judgment should be *de bonis testatoris*, yet it does not seem to have occurred to him to make that suggestion. He assumed, as the court below assumed, that the judgment was to go against him personally. The limitation for which he contended was in the amount of the judgment, not in the fund against which it should be directed.

There is some other evidence that at this time, and later, the judgment ran against the executor personally, and that the only limitation of liability expressed by it was in the amount. In the first case known to me in which executors were defeated on a plea of *plene administravit* it was decided that the plaintiff should recover of the defendants "without having regard to whether they had to the value of the demand."[1] Afterwards it was settled that in such cases the judgment for the debt should be of the goods of the deceased, and that the judgment for the damages should be general.[2] But whether the first case was right in its day or not, the material point is the way in which the question is stated. The alternatives are not a judgment *de bonis testatoris* and a general judgment against the defendants, but a judgment against the defendants limited to the amount in their hands, and an unlimited judgment against them.

[1] Y. B. 17 Ed. III. 66, pl. 83.

[2] Y. B. 11 Hen. IV. 5, pl. 11. Skrene in 7 Hen. IV. 12, 13, pl. 8. Martin in 9 Hen. VI. 44, pl. 26. Danby in 11 Hen. VI. 7, 8, pl. 12. Dyer, 32 *a*, pl. 2. 1 Roll. Abr. 931, D. pl. 3. 1 Wms. Saund. 336, n. 10.

But if it be assumed that a trace of absolute ownership still was shown in the form of the judgment, when we come to the execution we find a distinction between the goods of the testator and those of the executor already established. In 12 Edward III. a judgment had been recovered against a parson, who had died. His executors were summoned, and did not appear. Thereupon the plaintiff had *fieri facias* to levy on the chattels of the deceased in the executors' hands (*de lever ses chateux qil avoient entre mayns des biens la mort*), and on the sheriff returning that he had taken 20*s.* and that there were no more, execution was granted of the goods of the deceased which the executors had in their hands on the day of their summons, or to the value out of the executors' own goods if the former had been eloigned.[1]

I now pass to two other rules of law for each of which there is a plausible and accepted explanation, but which I connect with each other and with my theme. In former days, I was surprised to read in Williams on Executors, that the property in the ready money left by the testator "must of necessity be altered; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value."[2] What right, one asked oneself, has an executor to deal in that way with trust funds? In this Commonwealth at least the executor would be guilty of a breach of duty if he mingled money of his testator with his own. Another passage in Williams shows that we must not press his meaning too far. It is stated that money of the testator which can be distinguished does not pass to a bankrupt executor's assignee.[3] The principal passage merely was repeated from the earlier text-books of Wentworth and Toller. In Wentworth the notion appears to be stated as a consequence of the difficulty of distinguishing pieces of money of the same denomination from each other, — a most impotent reason.[4] There is no doubt that similar arguments were used in other cases of a later date than Wentworth.[5] But I prefer to regard the rule

[1] Y. B. 13 Ed. III. 398–401 (A. D. 1338), acc. 2 Rot. Parl. 397, No. 110 (Ed. III.). See also the intimation of Wychingham, J., in 40 Ed. III. 15, pl. 1. Fleta, Lib. 2, c. 57, § 6.

[2] 1 Wms. Exors. (7th ed.) 646. In the ninth edition this is qualified slightly by the editor in a note. (9th ed.) 566, 567 and n. (p).

[3] 1 Wms. Exors. 9th ed. 559. Howard *v.* Jemmett, 2 Burr. 1368, 1369, note; Farr *v.* Newman, 4 T. R. 621, 648.

[4] Wentworth, Executors (14th ed. Philadelphia, 1832), 198.

[5] Whitecomb *v.* Jacob, 1 Salk. 160; Ford *v.* Hopkins, 1 Salk. 283, 284; Ryall *v.*

as a survival, especially when I connect it with that next to be mentioned.

As late as Lord Ellenborough's time it was the unquestioned doctrine of the common law that the executor was answerable absolutely for goods which had come into his possession, and that he was not excused if he lost them without fault, for instance, by robbery.[1] Now it is possible to regard this as merely one offshoot of the early liability of bailees which still lingered alive, although the main root had rotted and had been cut a century before by Chief Justice Pemberton, and by the mock learning of Lord Holt.[2] It is explained in that way by Wentworth,[3] who wrote before the early law of bailment had been changed, but with some suggestions of difference and mitigation. If this explanation were adopted we only should throw the discussion a little further back, upon the vexed question whether possession was title in primitive law. But it is undeniable that down to the beginning of this century the greatest common-law judges held to the notion that the executor's liability stood on stronger grounds than that of an ordinary bailee, and this notion is easiest explained as an echo of a time when he was owner of the goods, and therefore absolutely accountable for their value. In the Chancery, the forum of trusts, it is not surprising to find a milder rule laid down at an earlier date, and no doubt the doctrine of equity now has supplanted that of the common law.[4]

There is no dispute, of course, that in some sense executors and administrators have the property in the goods of the deceased.[5] I take it as evidence how hard the early way of thinking died that as late as 1792, the King's Bench were divided on the question whether a sheriff could apply the goods of a testator in the hands of his executor in execution of a judgment against the executor in his own right, if the sheriff was notified after seizure that the goods were effects of the testator. As might have been expected the

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Rolle, 1 Atk. 165, 172; Scott *v.* Surman, Willes, 400, 403, 404. Rightly condemned *quoad hoc* in *Re* Hallett's Estate, 13 Ch. D. 696, 714, 715. See also Miller *v.* Race, 1 Burr. 452, 457, S. C. 1 Sm. L. C.

[1] Crosse *v.* Smith, 7 East, 246, 258.

[2] King *v.* Viscount Hertford, 2 Shower, 172; Coggs *v.* Bernard, 2 Ld. Raym. 909. The Common Law, Lect. 5, esp. p. 195. Morley *v.* Morley, 2 Cas. in Ch. 2.

[3] Executors (14th ed.), 234.

[4] Lord Hardwicke in Jones *v.* Lewis, 2 Ves. Sen. 240, 241 (1751); Job *v.* Job, 6 Ch. D. 562; Stevens *v.* Gage, 55 N. H. 175. See Morley *v.* Morley, 2 Cas. in Ch. 2 (1678).

[5] Com. Dig. *Administration* (B. 10). Cf., Wms. Exors. (9th ed.) 558.

judgment was that the sheriff had not the right, but Mr. Justice Buller delivered a powerful dissent.[1] A little earlier the same court decided that a sale of the testator's goods in execution of such a judgment passed the title, and Lord Mansfield laid it down as clear that an executor might alien such goods to one who knew them to be assets for the payment of debts, and that he might alien them for a debt of his own. He added, "If the debts had been paid the goods are the property of the executor."[2]

Another singular thing is the form of an executor's right of retainer. "If an executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and rests in himself; that is, he has them as his own proper goods in satisfaction of his debt, and not as executor."[3] This proposition is qualified by Wentworth, so far as to require an election where the goods are more than the debt.[4] But the right is clear, and if not exercised by the executor in his lifetime passes to his executor.[5] So when an executor or administrator pays a debt of the deceased with his own money he may appropriate chattels to the value of the debt.[6] A right to take money would not have seemed strange, but this right to take chattels at a valuation *in pais* without judgment is singular. It may be a survival of archaic modes of satisfaction when money was scarce and valuations in the country common.[7] But it may be a relic of a more extensive title.

The last fact to be considered is the late date at which equity fully carried out the notion that executors hold the assets in trust. In 1750, in a case where one Richard Watkins had died, leaving his property to his nephew and nieces, Lord Hardwicke, speaking of a subsequently deceased nephew, William Watkins, said that he "had no right to any specific part of the personal estate of Richard whatever; only a right to have that personal estate accounted for, and debts and legacies paid out of it, and so much as should

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[1] Farr *v.* Newman, 4 T. R. 621.

[2] Whale *v.* Booth, 4 Doug. 36, 46. See 1 Wms. Exors. (9th ed.) 561, note.

[3] Woodward *v.* Lord Darcy, Plowden, 184, 185.

[4] Executors (14th ed.), 77, 198, 199.

[5] Hopton *v.* Dryden, Prec. Ch. 179. Wentw. Exors. (14th ed.) 77, note, citing 11 Vin. Abr. 261, 263; Croft *v.* Pyke, 3 P. Wms. 179, 183; Burdet *v.* Pix, 2 Brownl. 50.

[6] Dyer, 2*a*. Elliott *v.* Kemp, 7 M. & W. 306, 313.

[7] See, *e. g.*, the application of the trusteed wool to the judgment in 1 Rot. Parl. 108. Assignment of dower *de la pluis beale*, Litt. § 49. Delivery of debtor's chattels by sheriff, St. Westm. II. c. 18. Kearns *v.* Cunniff, 138 Mass. 434, 436.

be his share on the whole account paid to him; which is only a debt, or in the nature of a chose in action due to the estate of William."[1] In M'Leod *v.* Drummond[2] Lord Eldon says that Lord Hardwicke "frequently considered it as doubtful, whether even in the excepted cases any one except a creditor, or a specific legatee, could follow" the assets in equity. On the same page, Hill *v.* Simpson, 7 Ves. 152 (1802), is said to have been the first case which gave that right to a general pecuniary legatee.[3] Hill *v.* Simpson lays it down that executors in equity are mere trustees for the performance of the will,[4] but it adds that in many respects and for many purposes third persons are entitled to consider them absolute owners. Toward the end of the last century their fiduciary position began to be insisted on more than had been the case, and the common-law decisions which have been cited helped this tendency of the Chancery.[5]

The final step taken was taken in M'Leod *v.* Drummond,[6] when Lord Eldon established the rights of residuary legatees. "It is said in Farr *v.* Newman that the residuary legatee is to take the money, when made up: but I say, he has in a sense a lien upon the fund, as it is; and may come here for the specific fund."[7]

Oliver Wendell Holmes.

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[1] Thorne *v.* Watkins, 2 Ves. Sen. 35, 36.

[2] 17 Ves. 152, 169 (1810).

[3] See also M'Leod *v.* Drummond, 14 Ves. 353, 354.

[4] P. 166. Note the recurrence with a difference to their original position in the early Frankish law. 1 Law Quart. Rev. 164.

[5] See also Scott *v.* Tyler, 2 Dickens, 712, 725, 726.

[6] 17 Ves. 152, 169.

[7] See Marvel *v.* Babbitt, 143 Mass. 226; Pierce *v.* Gould, 143 Mass. 234, 235; Mechanics' Savings Bank *v.* Waite, 150 Mass. 234, 235.

I made the decree appealed from in Foster *v.* Bailey, 157 Mass. 160, 162. The particular form which it took, allowing the defendant, the administrator of an administrator, to retain one share of stock and a savings-bank book as security for what might be found due to his intestate on the settlement of his account, and directing him to hand over the rest of the assets, was consented to, in case the defendant had a right to retain anything. I made the decree on the assumption that the change in the position of executor and administrator which I am considering left their rights undisturbed. Of course if the liability were only to account for a balance, the executor of an executor would not be bound to hand over anything more, and could not be compelled to pay anything until the balance was settled. His duty, when established, would not be to deliver specific property, but to pay a sum of money. I do not know what evidence can be found on this point. It is fair to mention that the plea offered in 30 Ed. I. 240, by executors of executors, was that, "We held none of the goods of the deceased on the day when this bill was delivered." But that may be no more than a general form. "Bonz" probably only meant property.